U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 565-5330
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DATE: May 2, 2000
CASE NO.: 2000 - INA - 44

In the Matter of:
BOB J. MOSSADEGHI,
Employer,

on behalf of

MELINDA BORBON,
Alien.

Appearance: Gloria Calonge, Esq.
Falls Church, VA

Certifying Officer: Richard E. Panati
Philadelphia, PA

Before: Holmes, Vittone, and Wood

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Melinda Borbon ("Alien") filed by Employer Bob J. Mossadeghi ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Naturalization Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 C.F.R. § 656. The Certifying Officer ("CO") of the United States Department of Labor, Philadelphia, Pennsylvania, denied the application, and the Employer and the Alien requested review pursuant to 20 C.F.R. § 656.26.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that 1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor, and 2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly

employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. § 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c). All parties were served with a Notice of Docketing and Order Requiring Statement of Position or Legal Brief on January 12, 2000; they were notified that all parties had twenty-one (21) days to submit a statement or brief, and such was required if a grounds of appeal was not stated in the request for review by the Board of Alien Labor Certification Appeals (the "Board").

Statement of the Case

On November 10, 1997, Employer filed an application for labor certification to allow him to fill the position of "Domestic Cook (live-in/live-out)" in his Vienna, Virginia home. The position was described as follows:

> "Plan and cook meals in employer's household, according to recipes or tastes of employer. Prepare the following types of cuisine: Oriental, Middle Eastern, and American. Peel, wash, trim and prepare vegetables and meats for cooking. Cook vegetables and bake breads and pastries. Boil, broil, fry and roast meats. Plan menus and order foodstuffs. Clean kitchen and cooking utensils. Serve meals. Prepare food for special diets and for occasional dinner and overnight guests."

The work week was thirty-six hours, with overtime as needed. The schedule for those hours was 4 p.m. to 8 p.m. on weekdays, and from 10 a.m. to 2 p.m. and 4 p.m. to 8 p.m. on weekends. Compensation was to be paid at $12.05 per hour, and overtime at time and a half. A high school education was required, and two years of experience in either the offered position or as household help with significant cooking duties. Special requirements were listed as verifiable references, good hygiene, no smoking or drinking on the job, and "Live-in/Live-out." (AF 41).

A state transmittal form dated August 31, 1998 is included in the file, and mentions a single referral for the job, but there is no further information in the file regarding recruiting. (AF 38-40).

A Notice of Findings ("NOF") was issued on February 4, 1999 which proposed to deny

the application based upon a failure to show that the position was full-time employment, and that the split shift on weekends constituted an unduly restrictive requirement. In Rebuttal, Employer was asked to explain in greater detail how the duties of the cook would fill the full-time week, and also to either show the business necessity of the split-shift or drop the requirement. (AF 35-37).

Employer requested, and was granted, an extension of time to file a Rebuttal. (AF 34, 33). On April 15, 1999, Employer filed a Rebuttal, which consisted of a letter giving greater detail regarding the duties of the cook and the family schedules. (AF 27-28).

On May 6, 1999, the CO issued a new NOF ("NOF(2)") in light of the Board's *en banc* decision in Carlos Uy III, 1997-INA-304 (Mar. 3, 1999)(*en banc*). Uy set out a new standard for evaluation of applications in Domestic Cook cases, and the NOF(2) properly rephrased the inquiry to address whether the position was *bona fide* under the totality of circumstances, as opposed to merely testing the duties called for and hours worked. The NOF(2) requested responses and documentation regarding twelve items on household schedules, job duties, and other related areas. The NOF(2) specifically informed Employer that mere responses to the questions posed were not sufficient; documentation was required where appropriate. (AF 23-26).

The Employer again requested an extension of time and was granted such. (AF 22, 21). On July 15, 1999, a Rebuttal was filed to the NOF(2). This consisted of a letter responding point by point to each inquiry. Additionally, the Employer attached cancelled checks to document payments to babysitters and gardeners. (AF 9-20).

On September 22, 1999, a Final Determination ("FD") was issued denying the application for labor certification on the grounds enunciated in NOF(2); no *bona fide* job opportunity was shown, and therefore the job was not clearly open to qualified U.S. workers. The CO found that the evidence submitted by Employer indicated that the Alien would necessarily have duties more in line with a general household worker. Cooking, the CO said, did not fully occupy the position's schedule, as most family members were away from the home during the day, and hence there would be no one for her to feed. Additionally, Employer indicated that outside baby sitters were used regularly, and that a relative cared for the daughter in the mornings, but did not state who would care for the children on a daily basis. Necessarily, the CO found, because the Alien would be the only adult present, she would be performing some child care duties. Similar logic was applied with regard to the general household chores; because the Cook would be present, she must be assisting with the chores. (AF 6-8).

Employer requested administrative review of the denial on October 21, 1999. The appeal was based upon the assertion that the CO employed a presumption that domestic cook positions cannot be full-time, that the schedules of cook and household address the absence of family members during the day, and that the totality of circumstances do indeed demonstrate that the position was *bona fide*. (AF 1-2). Employer submitted a brief restating these grounds on February 1, 2000.

Discussion

The Employer bears the burden of proving the elements necessary to establish entitlement to labor certification. 20 C.F.R. § 656.2(b). The Employer complains that this burden is increased because the CO applied a "preconceived notion" against the position of Domestic Cook. It is true that the CO considered the evidence and arguments of Employer in light of his experience and expertise, but in no way did that alter the burden of the Employer. The denial was not "arbitrary," but was instead based upon the situation detailed, as Employer noted, in the findings of NOF(2). There is an effective freeze on issuance of visas for unskilled workers, and therefore the Department of Labor is ensuring that the available skilled worker visas are indeed used for skilled workers, one of which is the position of domestic cook. We reject the Employer's first argument of bias against domestic cooks in general; there is no presumption against the position, and it is entirely permissible, and indeed desirable, for CO's to apply their experience and expertise in evaluating applications.

We agree with the CO that Employer's Rebuttal was insufficient to establish that a *bona fide* domestic cook position exists. We do not, however, agree with all of his reasoning. Specifically, we reject the proposition that just because someone is in the home, that person will clean. Mothers of teenagers everywhere can attest to this. We agree, however, that child care appears to be an unmentioned duty of the Alien. While the grandmother may care for the daughter in the mornings, when the Alien is not present, according to the work schedule, there is no evidence of who will provide child care on a regular daily basis in the afternoons. Babysitters are used "on a regular basis," but the submitted documentation is not sufficient to support the assertion.

Many of the babysitters are reportedly paid in cash, but no proof of such is submitted, such as letters from the sitters. Moreover, one sitter who is "paid monthly" received checks for March, May, and April for $50.00 each. This seems an especially low monthly wage, even for a neighbor child. We therefore find that babysitters are not used daily by Employer, and that the Alien, as the only adult in the home when the children return home from school, must be performing some child care duties.

The other reason cited by the CO, that no one will be home during the day to partake of the Alien's labors, is an even stronger grounds for denial. The Employer maintains that the Alien would work later in the day, closer to the time the children and parents arrive home, and therefore people would be home for a large part of the Cook's day. However, Employer also stated that the Alien would cook breakfast (AF 10). These positions are irreconcilable. Further, even if we assume that the cook prepares meals for the family to take to work or school, there still would remain a large period of time during each day when the Employer cannot claim the alien is engaged in cooking or related duties. While our decision in Uy, *supra*, held that the existence of work for full-time hours could not be the sole basis of a denial, we also held that it was properly considered as a part of the totality of the circumstances, as can inconsistencies in the statements and evidence of the Employer.

Additionally, we note that many of the responses, such as detailing entertainment schedules and recounting the hiring and wages of the Alien, are rather sparse. We find that the CO was justified in rejecting the Rebuttal.

Order

Therefore, based upon the foregoing, the Final Determination of the Certifying Officer is affirmed, and labor certification is denied.

For the Panel:

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John C. Holmes
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure and maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon granting of the petition the Board may order briefs.